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must be reversed, the verdict set aside, and the case remanded for a new trial, not in conflict with the views expressed in this opinion.

Note.

This case announces no new doctrine, but simply applies the well-settled and familiar rule that where the carrier has exercised the highest degree of practicable care, this is all the law requires, and a passenger cannot hold the company liable for injuries sustained. But its facts disclose such a clear case of passion and prejudice and disregard of instructions on the part of the jury, that we cannot refrain from commenting on it. At the present term, in a personal injury case, the court restated the rule which is axiomatic now that "the jury is the judge of the weight and credit to be attached to the evidence, and for this reason it has always been regarded as a delicate matter for the court to interfere." But that our court will undertake this "delicate matter" to prevent a miscarriage of justice not only in favor of a natural, but an artificial person, is clearly exemplified by the principal case. And just so long as our reversed jury system remains in its present imperfect state, and those "peers" are unable to overcome their feeling of bias in favor of female litigants as in this case, or are unable to sacrifice their sense of pity and compassion for that higher sense of right and justice, so long will it be necessary for appellate courts to invade the jury's province, perform their function as they should have performed it in the first instance, and thus deal out to all alike, even the "soulless" corporation, that measure of protection to which it may be entitled. In spite of the popular clamor against the courts at the present day, a casual glance at the reports will make it manifest to anyone that they are the great bulwarks of liberty for the freedmen in this and every other civilized country, and "from whence cometh his help" whenever he is oppressed. In this case the weight of the testimony was all one way, the jury disregarded it and there was nothing for the court to do but reverse and remand for a new trial.

COLEMAN *et al. v.* WOOD *et al.*

Sept. 10, 1908.

[62 S. E. 388.]

1. Wills—Testamentary Capacity—Married Women—Statutes.—Independent of Acts 1876-77, p. 333, c. 329, removing certain of the disabilities of married women, a married woman had no power to dispose of her real property by will.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 49, Wills, §§ 58, 59.]

2. Same—Construction.—Acts 1876-77, p. 333, c. 329, § 1, provided that property which a woman, thereafter marrying, owned at the time of her marriage, and the rents and profits thereof, should not be subject to the disposal of her husband, but should be her separate property, and that any such married woman might contract in relation

thereto or by the disposal thereof, and might sue and be sued as if she were sole, provided that her husband should join in all contracts with reference to her property. Section 2, p. 334, declared that all property thereafter acquired by any woman should be her separate estate subject to the limitations of the first section, though the marriage was solemnized before the passage of the act, and that she might devise and bequeath such property as if she were sole. Held that, where a woman acquired certain real estate in 1868 and married in 1878, such act did not confer on her power to dispose of such property by will.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 49, Wills, §§ 58, 59.]

Error to Circuit Court, Washington County.

Ejectment by D. C. Wood, assignee, and others, against John F. Coleman and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

J. J. Stuart, for plaintiffs in error.
L. P. Summers and *White & Penn*, for defendants in error.

BUCHANAN, J. The only question involved in this case is whether or not Jane Coleman, under whom both the plaintiffs and defendants claim (the former as her devisees and the latter as her heirs), had the power to dispose of the land in controversy by will.

The land in litigation was conveyed to Jane Wood (afterwards Mrs. Coleman) in the year 1868. She was married in February, in the year 1878, and died in the year 1899 (her husband surviving her), leaving a will dated in the year 1899.

Unless the effect of the act of April 4, 1877 (Acts 1876-77, p. 333, c. 329), known as the "Smith Act," was to give Mrs. Coleman the power to dispose of the property in question by will, she had no such power.

That act made radical changes in the law, but it did not do away with all the common-law disabilities of married women as to their property.

The first section of the act provided, among other things, that the property, real and personal, which a woman thereafter marrying owned at the time of her marriage, and the rents, issues, and profits thereof, shall not be subject to the disposal of her husband, nor liable for his debts, but shall be and continue her separate and sole property, that any such married woman shall have the power to contract in relation thereto, or for the disposal thereof, and may sue and be sued as if she were a feme sole, provided her husband shall join with her in any contract with reference to such real and personal property.

The second section declares that all property, real and personal, thereafter acquired by any woman, by gift, grant, purchase, inheritance, devise, or bequest, shall be and continue her sole and separate estate, subject to the provisions and limitations of the first section, although the marriage may have been solemnized previous to the passage of the act. It then expressly provides that she may devise and bequeath the property declared by that section to be her separate estate as if she were an unmarried woman. There is no provision in the first section of the act authorizing her to devise or bequeath the property declared by that section to be her separate estate.

The fact that a married woman is expressly given the power to dispose of property by will declared by the second section of the act to be her separate estate, and no such power is given in the first section as to the property therein declared to be her separate estate, would seem to indicate conclusively that the Legislature intended that she should have the power in the one case, and should not have it in the other. If her right of disposition by will in both cases was intended to be the same, no reasonable explanation has or can be given why the Legislature expressly conferred the power as to the property declared to be her separate estate in the second section and failed to expressly confer the same power in the first section, or as to the property declared by that section to be her separate estate.

It may be that, if the Smith act had been silent as to the power of a married woman to devise or bequeath the property declared by that act to be her separate estate, it could be held by a liberal construction that the legal or statutory separate estate created by that act was separate estate within the meaning of section 2513 of the Code, and subject to her power of disposition by will. But the Smith act not being silent, and expressly giving the power of disposition by will as to the property embraced in one section, and failing to give it as to the property embraced in the other, it must be held that Mrs. Coleman's power to make a will as to the property in controversy was governed by that act, and that she did not have the capacity to devise the property in controversy.

We are therefore of opinion that there is no error in the judgment complained of, and that it should be affirmed.

Affirmed.